Appendix C

Pleadings Filed in Reconsideration Proceeding

Petitions for Reconsideration:

Adelphia Communications Corporation
Arizona State University, Benedek Broadcasting Corporation, Midwest Television, Inc., and Raycom Media, Inc. (collectively "Broadcast Group")
Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "Noncommercial Broadcasters")
Gemstar-TV Guide International, Inc. ("Gemstar")
National Association of Broadcasters, Association for Maximum Service Television, Inc., and Association of Local Television Stations, Inc. (collectively "Commercial Broadcasters)
National Cable Television Association ("NCTA")
Paxson Communications Corporation ("Paxson")
Telemundo Communications Group, Inc.
Time Warner
The Walt Disney Company

Oppositions/Comments:

A&E Television Networks
Guenter Marksteiner
Mediacom Communications Corporation
National Association of Broadcasters, Association of Maximum Service Television, Inc., and Association of Local Television Stations, Inc.
Gemstar-TV Guide International, Inc.
National Cable & Telecommunications Association
Paxson Communications Corporation
Time Warner

Replies/Comments:

Adelphia Communications Corporation
Association of America's Noncommercial Broadcasters, Public Broadcasting Service, and Corporation for Public Broadcasting
FBC Television Affiliates Association
Gemstar-TV Guide International, Inc.
National Association of Broadcasters, Association for Maximum Service Television, and Association of Local Television Stations, Inc.
National Cable & Telecommunications Association
Paxson Communications Corporation ("Paxson Consolidated Reply")
Paxson Communications Corporation ("Paxson Reply to Mediacom")
Tribune Broadcasting Company
Time Warner
The Walt Disney Company

Appendix D

Final Regulatory Flexibility Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA),[1] requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[2] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[5]

2. In this Second Report and Order and First Order on Reconsideration, the Commission takes action on two significant cable carriage issues, the resolution of which are essential to the Commission's ongoing efforts to complete the transition from analog to digital television. The issues resolved in this Order concern (1) whether cable operators are required under the Communications Act to carry both the digital and analog signals of a station (also referred to as "dual carriage") during the transition when television stations are still broadcasting analog signals; and (2) whether the Commission, in the *First Report and Order* in this proceeding, properly construed the term "primary video," which appears in Sections 614(b)(3) (for commercial broadcasters) and 615(g)(1) (for noncommercial broadcasters), as requiring cable operators to carry only a single video programming stream (and not multiple streams of several separate, independent, and unrelated programming streams). Further, in the *First Report and Order*, the Commission also determined that the statute neither mandates nor precludes the mandatory carriage of both a television station's digital and analog signals. The Commission tentatively concluded that, based on the available record evidence, a dual carriage requirement would likely violate cable operators' First Amendment rights. In order to evaluate the issue more fully, the Commission adopted a *Further Notice of Proposed Rulemaking*. In this Second Report and Order and First Order on Reconsideration, the Commission affirms its tentative decision in the *First Report and Order* not to impose a dual carriage requirement on cable operators, and declines, based on the record evidence, to require cable operators to carry any more than one programming stream of a digital television station that multicasts.

3. Although the Commission did not receive any comments directed at the Initial Regulatory Flexibility Analysis, some of the comments filed in response to the *Further Notice of Proposed Rulemaking* addressed issues of concern to small entities. The American Cable Association, for

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[1] The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] 5 U.S.C. § 605(b).

[3] 5 U.S.C. § 601(6).

[4] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[5] 15 U.S.C. § 632.

example, filed reply comments contending that dual carriage and mandatory multicast carriage would be overly burdensome for small cable operators because of the more limited channel capacity of smaller cable systems and that the costs of implementing such requirements, if imposed, "present an economic impossibility" for smaller systems.[6] The Commission considered these concerns, and decided not to impose additional requirements. While small broadcast television stations could benefit from a decision to impose mandatory dual carriage and mandatory multicast carriage, consideration of the economic impact of our decision is only relevant to cable operators, because the obligation to comply with an expanded must carry requirement would attach (in the context of this proceeding) only to cable operators – *i.e.*, a decision not to impose expanded must carry requirements does not, in any way, result in any regulatory obligation on the part of television broadcast stations or any other non-cable entities. Our resolution of the specific issues in the Second Report and Order and First Order on Reconsideration does not result in any rule changes affecting small entities.

5. The Commission, therefore, certifies that the requirement of this Second Report and Order and First Order on Reconsideration will not have a significant economic impact on a substantial number of small entities. Rather, it appears that our decisions here are likely to foster competition in the video marketplace and ensure the ability of small cable systems, in particular, to maximize the use of its available capacity to deliver diverse digital programming and to offer other services, such as high-speed Internet service, to customers.

6. The Commission will send a copy of the Second Report and Order and First Order on Reconsideration, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.[7] In addition, the Second Report and Order and First Order on Reconsideration will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.[8]

[6] *See* American Cable Association Reply Comments at 6-9.

[7] *See* 5 U.S.C. § 801(a)(1)(A).

[8] *See* 5 U.S.C. § 605(b).

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules

Today we hold that Congress did not give broadcasters the statutory right to free carriage of all their channels on a cable provider's system. This is the second time we have held the statute does not authorize "multi-casting." New digital technology allows broadcasters to take what once was one channel, and divide it into four to six or even more channels in the future as compression technology advances. While that affords them expanded business opportunities, we hold nonetheless the statute limits cable carriage rights to one. They, of course, remain at liberty to commercially negotiate for carriage of other channels, just as public broadcasters have recently done and as other cable programmers must do.

The must-carry statute limits the video signal that must be carried to the "primary video." While, admittedly, lawyerly wordsmiths can argue what "primary" means, it clearly evidences intent to restrict, or limit the video that must be carried. If some video is primary, it necessarily follows that some is secondary. The view urged by broadcasters that primary video includes *all* their video streams without limitation proves too much and, to my mind, effectively strikes the restriction from the books.

When interpreting a statute that is susceptible to different interpretations, the commission is admonished to read it in a manner that best avoids raising serious constitutional issues. Must-carry unquestionably imposes a first amendment burden on cable providers. Indeed, the Supreme Court upheld the must-carry statute only by a slim 5-4 margin. I believe reading the statute now as expansively as broadcasters urge would likely wither before a First Amendment challenge. At a minimum, a serious constitutional question would be raised. In such circumstances, the law directs the agency to endorse the reasonable interpretation that avoids such a question, if possible. Reading the statute to authorize one video stream gives effect to the primary restriction and best avoids constitutional infirmity.

Moreover, in contrast to how the statute is applied in the analog context, Congress has made no factual findings about the need for multi-cast must-carry in a digital context. In fact, it has not spoken directly to the point at all. The Commission would be on weak ground if it interpreted Congress' will to authorize multi-cast must carry without a better legislative foundation. Consequently, it would be wholly improper for this agency to expand the must-carry regime—concurrently expanding the First Amendment imposition—without a clearer directive from Congress.

Finally, the record simply does not demonstrate with any strength that vital or important government interests are advanced, sufficient to justify further encroachment on the first amendment rights of cable providers. Broadcasters provide a valuable service to the American people, and their voice remains one government should work to preserve, but it simply is not the case, in our judgment, that an expansion of carriage rights is necessary for their survival, or to preserve diversity and localism. Recognizing the expense of making the digital transition, the government has taken steps to subsidize it by providing billions of dollars of spectrum for free, and through other government actions, such as mandatory digital tuners in televisions and broadcast flag protection. I do not believe a constitutionally suspect reading of the must-carry statute needs to be added to the list.

Over the course of the last four years, the Commission has taken nearly every step within our authority to bring the public the wonders of digital television and put our country in a position to reclaim needed spectrum for future public safety and broadband use. Today, we finally strike off our list another open question about the terms of that transition.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Cable Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120.

Over the last several years — covering almost the entirety of my tenure at the FCC — the Commission has struggled with the issue of mandatory multicast carriage of digital television streams (and, to a lesser extent, with dual carriage of analog and digital broadcast signals). The Commission has proceeded with great caution because of the complexity of the constitutional issues and the importance of these matters to the digital television transition. Now that the matter has finally been presented for a vote, I am forced to conclude that the Commission lacks authority to mandate either dual carriage or multicast carriage. In light of the overwhelming attention paid to the multicasting issue in the comments and ex parte process, I elaborate on my reasoning regarding multicasting below.

Broadcasters have been persuasive in arguing that their development of multiple digital programming streams promises to deliver significant public interest benefits, including the advancement of the DTV transition. And they are undoubtedly correct that, in the absence of mandatory cable carriage for all these streams, many broadcasters may be forced to curtail the breadth of their digital programming services. As I read the relevant Supreme Court precedent, however, the test is *not* whether a multicasting requirement would deliver more broadcast content to consumers. Rather, the Court set the bar much higher: To justify the considerable restrictions on cable operators' First Amendment freedoms entailed by a multicasting requirement, the Commission would have to adduce "substantial evidence" in support of a finding that multicasting is necessary to prevent a substantial number of broadcast stations from suffering significant financial hardship.[1] The record simply does not support such a conclusion.

A threshold problem for proponents of mandatory multicasting is that, in contrast to the circumstances surrounding the analog must-carry requirement, Congress has not expressly directed the Commission to adopt a multicasting mandate, much less issued detailed factual findings in support of such a requirement. There is a substantial argument that the Act *precludes* adoption of a multicasting requirement as a matter of statutory interpretation. But even assuming that the Act is ambiguous and thus *permits* a multicasting requirement — as I am willing to conclude — the absence of express congressional direction would deprive the Commission of the heightened deference accorded to legislative determinations.[2]

Moreover, as an empirical matter, the record developed before the Commission cannot justify a conclusion that multicasting is necessary to the continued preservation of the benefits of broadcast television. Critically, broadcasters will continue to be entitled to compulsory carriage of their primary video signal, along with all program-related material, thereby preserving the status quo. While broadcasters undoubtedly would prefer guaranteed carriage for any new programming services they develop, any contention that carriage cannot be secured through voluntary negotiations is purely

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[1] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 211 (1997) (*Turner II*); *see also id.* at 208 ("The harm Congress feared was that stations dropped or denied carriage would be at a serious risk of financial difficulty . . . and would deteriorate to a substantial degree or fail altogether.") (internal quotation marks and citations omitted).

[2] *See Turner II*, 520 U.S. at 199 ("Even when the resulting regulation touches on First Amendment concerns, we must give considerable deference, in examining the evidence, to Congress' findings and conclusions . . . .").

speculative — and thus a far cry from the "substantial evidence" required to pass First Amendment muster. Even assuming that there were some evidentiary basis to presume that voluntary carriage is doomed to fail, the Commission would still need to identify substantial evidence in support of the assertion that denial of carriage for new digital programming streams would subject broadcasters to "a serious risk of financial difficulty"[3] notwithstanding the preservation of must-carry rights for the primary video signal.

In fact, far from showing that negotiated carriage will not occur and that this failure will imperil the future of broadcasting, the record in some respects points to the contrary conclusion. Notably, the National Cable & Telecommunications Association reached a broad accord with the Association of Public Television Stations to provide for voluntary cable carriage of up to four streams of free non-commercial digital broadcast programming and associated material from one public television station in each market, in addition to the station's analog signal.[4] Negotiations regarding carriage of commercial stations have not progressed as far, but the record indicates that many stations already have obtained carriage for non-primary streams,[5] and common sense suggests that most cable operators will want to carry programming that would significantly interest their subscribers — especially free programming. As noted above, I am mindful of the reality that, in a competitive environment, some broadcasters — particularly smaller independent stations — likely will be unable to secure carriage in some instances. But too many unsupported and attenuated inferences would be required for that likelihood to justify a sweeping determination that the benefits of broadcasting will be imperiled in the absence of mandatory multicasting.[6]

In closing, this decision, while important, leaves the Commission and Congress with much work ahead to bring the DTV transition to a successful conclusion. Without question, the Commission must consider more fully what it means to be a broadcaster in the digital age, including how the competitive marketplace intersects with the various public interest obligations that have traditionally been imposed on broadcasters. As Congress considers an appropriate deadline for the return of analog broadcast spectrum, it will no doubt examine a host of related issues, including the multicasting debate. Given the strong congressional interest in the DTV transition and the interrelatedness of multicasting with other aspects of the transition, it is appropriate for the final resolution of this debate to occur before the legislature.

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[3] *Id.* at 208.

[4] APTS/NCTA Press Release, Public Television and Cable Announce Major Digital Carriage Agreement, Jan. 31, 2005.

[5] Comcast, for example, reports that it has entered into multicasting agreements with more than 130 commercial broadcast stations located in 62 markets. Comcast Ex Parte Letter at 2 (filed Feb. 3, 2005).

[6] While the plurality opinion in *Turner II* considered an analog must-carry requirement a narrowly tailored means of promoting fair competition, the Commission is further constrained by the fact that five justices concluded that that less intrusive must-carry requirement was *not* necessary to prevent anticompetitive conduct. *Turner II*, 520 U.S. at 226 (Breyer, J., concurring), 232 (O'Connor, Scalia, Thomas, and Ginsburg, JJ., dissenting).

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules

In a few moments, I will vote to concur in this item. It was not an easy decision. I do so because the item has been significantly improved from what it was through the intense discussions of recent days. Still, the outcome falls far short of what might have been, the timing is out-of-sync with other important proceedings, and the process short-circuits the Commission's public interest responsibilities.

We are told to act now because this proceeding has been pending for so long. That's fine—if we have done our work. But we have not done our work. Other items integral to this one, prerequisites for today's vote, have been around even longer. Consider that in 1999, more than a year ***before*** our first must-carry vote, we opened a proceeding on the public interest obligations of digital TV broadcasters. And in that public interest proceeding, remember that we were not writing on a blank slate. Rather, we were addressing issues raised in a report from a Presidential advisory committee that was issued a full year before that. It is six years later now, and this Commission still has not provided the American people with a clear idea as to how broadcasters' enhanced digital spectrum is going to improve our viewing experience. The must-carry decision was a golden opportunity in which to consider this—but we let it slip away. Instead we have a record of inaction that will go down, I believe, as the Commission's major failing in its efforts to move the digital transition forward.

So I want to be clear that this Order is not of my making and its timing is not of my choosing. I have been abundantly clear throughout that we should address the public interest first. I have begged my colleagues to do this. I have begged my broadcaster friends to engage the issue. The digital transition holds the promise of reinventing free, over-the-air television by not only providing consumers new and valuable services, but offering broadcasters new and valuable business opportunities.

I am frustrated that broadcasters have been reluctant to engage in a dialogue on the public interest. It is particularly small and independent broadcasters who should be leading the discussion because they have so much to gain—or lose—via the wrong must-carry outcome. The networks and stations with real market leverage need not worry—they know they will have carriage through the pure power of their market negotiating muscle. I am concerned, however, about independent broadcasters, including those that seek to provide public affairs programming, religious programming, family-friendly programming, Spanish-language programming, or other programming to reach underserved parts of their communities. Independent broadcasters already face so many challenges in this consolidated environment, and I worry that this decision may impose very high opportunity costs on them. I am also concerned, I should add, that this decision may lead some broadcasters to use the public spectrum for ancillary pay services, rather than for free over-the-air broadcasts to their communities. That's not what the digital transition is supposed to be all about.

When we pause to consider what truly local stations could bring to the television experience by way of covering community developments, local news, district-level Congressional races, high school and local college sports and how they could feature and encourage local talent and local creativity, it becomes very clear very quickly that making good use of this spectrum is profoundly important to the people—you and me—who own it.

My disappointment goes beyond the broadcasters to the Commission itself, because it has short-circuited proceedings that cried out to be completed before we decided on the must-carry item. We are little more than half way through the grassroots localism hearings the Commission pledged to conduct so that we could better understand how to promote media diversity and localism. Isn't how broadcasters

make use of the significant additional spectrum resources given to them integral to any worthy discussion of diversity and localism? But we'll complete localism later, I guess. Ready, fire, aim. Our snail's pace in handling public interest items that have been pending here for more than five years is, to me, embarrassing. Today we manage to get some assurance that the public interest items will be called up soon and hopefully completed before the year is out—these are items pertaining to disclosing a station's public file on the Internet and the even more important proceeding regarding the general responsibilities of television broadcasters in the digital era—something on which the Presidential advisory committee spent a lot of time and effort and also something which a host of public-spirited groups have been advocating for years. If we can move boldly forward on items concerning the mechanics of the digital transition—like we did on digital tuners, plug-and-play, the broadcast flag, signal replication and so on—then why, oh why, haven't we been able to address what's in the digital revolution for our consumers and citizens?

Time and again we have failed the American people and local broadcasters. On top of the localism and public interest proceedings I just mentioned was the majority's decision in 2003 to drastically loosen media consolidation protections, thereby threatening the very survival of small local broadcasters who represent what is left of localism and diversity in the new big media environment. We also have failed to deal in a timely fashion with the NASA petition concerning local stations' relationship to the networks. Now we fail again.

I believe that a properly-crafted must-carry decision would be a boon to localism, diversity and competition. Does that mean cable should have to carry every programming idea that any broadcaster can dream up? Of course not. I don't believe cable should have the burden to carry every camera hanging out of a window or the home shopping programs or all those infomercials masquerading as real programs. Our challenge is to craft some balance here. But we never sought balance. We never had that public dialogue about how to incent truly local and diverse programming. Nor, indeed, did we attempt to understand the economic consequences that would flow from any of the various decisions we could have made about must-carry. What does it mean for broadcasting if there is no available audience for those huge swaths of spectrum opportunity that multicast affords? What does our decision mean in terms of who has what leverage in future carriage negotiations? What does this mean especially for small, independent stations who just may have the wherewithal and the desire to provide good multicast programming but who lack negotiating power to give it an audience? Where is the analysis here? Someone is going to pay for whatever decision we make—and, here as in so many other areas, it is the consumer who ends up footing the bill, monetary and otherwise.

Even where I agree with specific outcomes, I disagree with much of the analysis in this item. For example, I concur with the decision to deny dual carriage during the digital transition; I agree that a dual carriage mandate would be a burden that cable operators are not legally required to shoulder. But I believe our denial need not reach the Constitutional issues referenced in today's item. I also believe there is ample latitude available to the Commission to determine changed carriage requirements in a changed media environment through both the broad language of the statute and also through court decisions admonishing us to seek diversity, a multiplicity of voices and a viable environment for free, over-the-air broadcasting. These fundamental objectives are at the heart of our communications statutes and they have been repeatedly referenced and upheld by courts across the land. By the way, I also wonder why, if there is such urgent need to decide must-carry today, the related question of what "program-related" means does not qualify for our decision-making at this time?

I urge cable operators and broadcasters to negotiate in good faith for cable carriage of local programming or other broadcast offerings that serve their communities. Maybe it's the impossible dream, but the promising agreement that issued last week from discussions between cable and public television indicate that, dreams aside, it can be done. The agreement between cable operators and public television to guarantee cable subscribers access to digital public television programming breathes hope and life into digital television like nothing else we have seen. I commend the parties for their dedication to

accomplishing this landmark agreement, I hope all operators will participate, and I hope we will all learn a lesson from it.

I also wish to emphasize, as the Order now does, that the decision we make today is based on the record presently before us. It is an incomplete record if for no other reason than important prior proceedings, upon which this one should have depended, are left unfinished. I look forward to a day when the Commission will once again accept its responsibility and we can have a dialogue on localism, diversity and the public interest in the digital age that will yield consumer-friendly, and citizen-friendly, results, allowing us all to reap the expansive new opportunities that digital technology can produce.

The discussions of the past few days have been intense for all of us. I want to thank my colleagues for their hard work. All of them participated, but I want to single out Commissioner Adelstein particularly for the energy, commitment and creativity he has brought to our discussions. He has my deep and sincere gratitude. Thanks also to our hard-working personal staffs, who braved late hours and even sickness to work through this, and thanks to all those in the Bureau who worked so hard on this proceeding.

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN
DISSENTING IN PART AND APPROVING IN PART

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration, CS Docket 98-120

Today, the Commission concludes that broadcasters should not get cable carriage of their multicasted broadcast signals. This issue has been pending for several years and the decision was a difficult one for the Commission. Indeed, even the majority acknowledges that the statutory language is ambiguous, and therefore that we could have interpreted it to mandate broader carriage. Ultimately, the Commission made a policy judgment that the benefits of this programming were outweighed by the burden on cable operators. I disagree. I think the public would benefit more from more free programming.

Congress gave broadcasters valuable spectrum to use to offer "advanced" television to American consumers. Thanks to recent technological developments, broadcasters now can use this digital spectrum to offer high-definition programming as well as several additional standard definition programming streams at the same time. Without cable carriage, however, many of these programs will not have the opportunity to succeed commercially. As a result, by denying cable carriage to all but one of the potential broadcast streams, this Order effectively prevents any broadcaster relying on "must carry" from investing in multiple programming streams. The record is replete with examples of the free programming services broadcasters want to provide or expand, including local news, local weather, local sports, coverage of local elections and government proceedings, and foreign language programming. Yet, with carriage rights for only one stream, these broadcasters cannot support all of this additional programming. The burden on cable of a requirement to carry these multicasted channels, however, actually would be significantly less than it was in the analog world, due to compression technology and dramatically expanded cable capacity. Moreover, the burden on cable capacity is capped by statute—a cap that has been upheld by the Supreme Court.

Finally, it should be kept in mind that this decision will have the most adverse impact on small, independent, religious, family-friendly and minority broadcasters. Network stations and most large-market broadcast affiliates are likely to get their signals carried through retransmission consent; must-carry was never about the large broadcasters. Must carry was designed for these smaller broadcasters that in the past have been unable to negotiate with larger cable operators. These broadcasters play an important part in their communities, and we should not be hindering them from investing in new, free programming for their viewers.

SEPARATE STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules; CS Docket No. 98-120; Second Report and Order and First Order on Reconsideration

It's been somewhat agonizing to reach the decision I'm voting to approve today. Neither the timing nor the conclusion is ideal. I tried unsuccessfully to work both within the Commission and with the broadcasting industry to steer a different path, one premised upon guarantees for the public interest. But the Commission has thus far failed to address the public interest proceedings. So, in many ways, this decision is the unfortunate result of neglect, during the past two years that I so strongly pressed for the public interest.

I appreciate the support of my colleagues in making changes to the item that greatly improved it. I certainly commend the Chairman and my colleagues for agreeing in this item to move the public interest and enhanced disclosure items in the next few months, and completed within the year. This is an historic commitment by the Commission. But this gesture comes too late to prove of any consequence in calculating the proper outcome of this must-carry proceeding.

As I have traveled this country engaging the public on the state of their local media, I heard heartwarming stories of local broadcasters who epitomize responsible stewardship of the public airwaves. I have witnessed extraordinary local service provided by broadcasters all across our country. I saw many examples in small and rural markets. I applaud those broadcasters who are building upon that special local service with digital programming. Unfortunately, without some baseline public interest obligations, I cannot conclude that every broadcaster will treat extra digital program streams with the same sense of responsibility for local service.

In the analog world, the strong local service that broadcasters were already providing went a long way toward Congress establishing and the Supreme Court narrowly upholding a single-channel carriage mandate.[1] At that time, without must carry, over-the-air viewers were threatened with being deprived of many broadcast channels. Today's action does not affect the required carriage of a single digital channel, so the over-the-air viewing public will not face the same type of threat. Here, instead, broadcasters seek carriage of additional program streams that are largely unknown and remain unaccountable to the public. The more pertinent question is how much benefit the extra program streams – without any public interest protections – provide to this audience. For this reason, I've long held and expressed forcefully that it's imperative for the Commission to articulate strong public interest obligations before reconsidering multicast carriage issues. My efforts proved futile.

Having no assurance that true local service will materialize on each new digital program stream, I am not prepared to conclude as a legal or policy matter that Congress intended carriage of these streams.

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[1] Congress based analog must carry on public interest justifications, including broadcast television as a source of "local origination of programming," and an "important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." 1992 Cable Act at §2(a)(10) & (11).

Primary Video & My Primary Considerations:

From my earliest days on the Commission, I have been bombarded with various definitions of the term "primary." Since that time, the intensity of the multicast carriage debate has never waned. The statute's undeniable ambiguity means underlying policy factors and Congressional intent take on greater importance.[2]

1. Protecting Public Broadcasters:

A top consideration of mine in this proceeding was to understand how digital must carry rules would affect public broadcasters. Public television stations have shown a real commitment to making the digital transition happen while serving the public interest. They were the first with real plans for how their multicast program streams could enrich and sustain the public, including new programs for children, teachers, seniors, non-English speakers, individuals with disabilities, and other underserved populations. Through local educational interactive services, increased local public affairs coverage, including state legislatures and local town meetings, and workplace development programs, it's easy to understand how these digital plans translate into benefits for the viewing public. Also, because public broadcasters do not share the same statutory retransmission consent rights as commercial broadcasters, the carriage of each of their program streams was a vital consideration for me.

So I was particularly pleased that the cable industry stepped forward and, through the personal leadership of Robert Sachs, reached a comprehensive and long-term agreement to carry the bold new offerings planned by America's public television stations. I understand this agreement took hard work and compromise on both sides. I commend the cable and public television industries for working through the details to reach common ground. APTS President John Lawson has been a tireless advocate and leader for public television stations. The agreement between the cable industry and public television takes away one of my major concerns in the multicasting debate, as I can see clearly that the public stands to benefit in very tangible ways from this arrangement.

2. Defining the Digital Public Interest:

My other major concern has been trying to understand how the public stands to benefit from multicasting and what that means for a governmental carriage mandate. For nearly two years, both internally and externally, I have consistently maintained that it would be premature to decide multicast carriage without assurance that each programming stream would indeed serve its local community through the imposition of concrete and meaningful public interest requirements. I reached out directly on a number of occasions to the National Association of Broadcasters seeking an earnest dialogue on digital public interest obligations. I repeated this request to each broadcaster that came into my office. A handful of public-service minded broadcast stations and networks pledged to work with me. They expressed their pride in serving their local communities, and assured me they understood the need to put some parameters on the new digital program streams. Those companies should know that I took their pledge seriously and wanted to work with them to prescribe meaningful public interest requirements.

Unfortunately, for two years I was unable to engage the industry in an effective fashion to step forward and engage in public interest discussions. Illustrating the resistance, the NAB expressed hostility

[2] On the record before us, without more explicit instruction from Congress, I agree that the Commission should not impose dual carriage obligations on cable operators.

to the Commission even inquiring into broadcast localism.[3] And aside from concluding a children's programming item last year, the Commission until today continued to sit on an enhanced public disclosure proposal and a more than five-year old general inquiry into digital public interest obligations.[4] Now, the NAB has asked us to reconsider the children's television item, saying that our action simply to make broadcasters' children's programming obligations commensurate with the amount of programming they choose to air on multicast streams is constitutionally suspect and will inhibit multicasting generally.[5] So the public interest continues to be neglected by the broadcast industry and the Commission.

This is not for the lack of a vocal coalition of organizations dedicated to advancing the public interest. I commend the Public Interest, Public Airwaves Coalition[6] for presenting a public interest proposal, as well as other entities with other approaches. I deeply regret that these ideas were not put out for public comment to frame the multicasting dialogue. It would be a worthwhile discussion. I expect it will be when the Commission fulfills its commitment to act on this proceeding this year, and it certainly still can be in Congress. I give the Coalition a lot of credit - many diverse entities, all working together to further the public interest, never gave up the notion that the public has a right to be heard on matters involving their public airwaves.

That is how it should be. The Commission has a sacred responsibility to regulate broadcasting in the public interest for the American people. Through their stewardship of the public airwaves, broadcasters play a significant role in our society. Spectrum scarcity and exclusive federal licenses to use the public's airwaves set broadcasting apart from other media. A cornerstone of the public interest is that broadcasters air programming to serve the needs and interests of their communities.

The digital television transition holds the promise that broadcasters will seize upon business opportunities and deliver new and valuable services to consumers. But without protections for the public, none of this is guaranteed. In recognizing a governmental interest in preserving the benefits of free, over-the-air local broadcast television, the Supreme Court was rightly concerned with the preservation of free outlets of localism and diversity for the viewing public. For that reason, a broadcaster's public interest obligations could not be more relevant to considerations of multicast carriage.[7] So to me the focus should

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[3] *See* In re Broadcast Localism, MM Docket No. 04-233, Comments of the National Association of Broadcasters at i (filed Nov. 1, 2004) ("NAB Localism Comments") ("The National Association of Broadcasters oppose the Notice of Inquiry on localism.").

[4] *See* In re Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry, MM Docket No. 99-360 at ¶ 8 (Dec. 15, 1999) (seeking comment on "how broadcasters can best serve the public interest during and after the transition to digital technology," including "how broadcasters could better serve their communities of license").

[5] In re Children's Television Obligations of Digital Television Broadcasters, MM Docket No. 00-167, National Association of Broadcasters Petition for Reconsideration and Request for Clarification (filed Feb. 2, 2005).

[6] The Public Interest, Public Airwaves Coalition includes Alliance for Better Campaigns, Benton Foundation, Campaign Legal Center, Center for Creative Voices in Media, Center for Digital Democracy, Center for Governmental Studies, Center for Voting and Democracy, Citizens for Independent Public Broadcasting, Committee for the Study of the American Electorate, Common Cause, Democracy Matters Institute, Demos, Free Press, Georgetown University Law Center's Institute for Public Representation, Global Resource Action Center for the Environment, Media Access Project, Media for Democracy 2004, MediaChannel.org, MoveOn.org, National Council of Churches, New America Foundation, Office of Communication of the United Church of Christ, Rock the Vote, Public Citizen, True Majority, United States Conference of Catholic Bishops, U.S. Public Interest Research Group, and Women's Institute for Freedom of the Press. The Coalition submitted a proposal for quantitative standards and for disclosure of local, civic, electoral affairs, independently produced, underserved community, paid and closed captioned programming.

[7] Indeed, the Senate Commerce Committee recently voted for the Commission to complete both proceedings simultaneously. *See also* Letter to Hon. Michael K. Powell, Chairman, FCC from Hon. Diane E. Watson *et al.* (July (continued....)

never stray from the public interest, and the benefits that free over-the-air broadcasting provides to viewers.

Congress clearly specified that digital broadcasting must continue to serve the public interest,[8] but how this obligation will be fulfilled has yet to be decided. After promising to do so in 1997, and beginning a general inquiry more than five years ago, the Commission has taken few other steps to define the digital character of broadcasting.[9] If broadcasters choose to multicast, what should be required for the additional program streams? Should the Commission promote localism by requiring a portion of each program stream to air locally-produced programming?[10] How will the extra capacity be used to further diversity? Will broadcasters use this capacity to invigorate political discourse? And how will broadcasters disclose to the public how they met their public interest requirements on the additional streams? The answers to these questions will shape the digital television era, yet the Commission has never even begun a rulemaking proceeding to define the precise contours.

The need for enhanced public interest requirements in a multicasting era was established long ago. In 1998, the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, comprised of a broad cross-section of interests including broadcasters, educators, and advocates, issued a comprehensive report. They acknowledged that the digital transition would profoundly affect "[t]he quality of governance, intelligence of political discourse, diversity of free expression, vitality of local communities, opportunities for education and instruction, and many other dimensions of American life."[11] The report concluded that broadcasters who choose to multicast, "and in doing so reap enhanced economic benefits," should have additional public interest responsibilities: "If the digital portion of the public airwaves does provide enhanced economic benefits to broadcasters, . . . it is reasonable to recommend ways for the public to receive some benefit in return."[12] The Commission recently validated this principle by determining that the public interest obligations for children's television should be commensurate with the new opportunities provided by digital channels.[13]

Several broadcasters have told me that they could agree to definable public interest obligations and believe they would easily exceed them. I have every confidence that most broadcasters would. Some broadcasters excel at providing real in-depth political coverage. Belo's "It's Your Time" campaign, Hearst-Argyle's strong commitment to candidate-centered coverage, Scripps' and Young Broadcasting's

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23, 2004) (signed by 35 Members of Congress urging the Commission to define public interest obligations before digital multicast must carry).

[8] 47 U.S.C. § 336(d) ("Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity.").

[9] In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report & Order, 12 FCC Rcd 12809, 12830 (1997). A recent exception is the recent order on children's TV item, where the Commission determined that the public interest obligations for children's television should be commensurate with the new opportunities provided by digital channels. *See* Children's Television Obligations of Digital Television Broadcasters, Report & Order, 19 FCC Rcd 22943 (2004) ("Children's Digital TV Order").

[10] Indeed, I find it instructive that when identifying which low-power television stations would be entitled to must carry, Congress limited the stations only to those that meet a variety of criteria, including certain programming requirements, and a determination by the Commission that the programming will "address local news and informational needs." 47 U.S.C. § 534(h)(2)(B).

[11] *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters* at xi, 1. (Dec. 18, 1998) ("Advisory Committee Report").

[12] *Id.* at 43.

[13] *See* Children's Digital TV Order, *supra* note 5.

free air time to candidates, Capitol Broadcasting Company's extensive local political coverage, and Post-Newsweek's similar efforts are some of the standouts. Networks such as NBC and ABC have worked with their affiliates on local weather and local news multicast channels. But as a Commission, we cannot just consider these broadcasters. We also must be concerned with assuring that *every* broadcaster will meet a baseline public interest standard.

And there is reason enough to be cautious about the broadcasting industry's recent public service record. Study after study has documented declining civic affairs coverage. There is scant coverage of local or state candidates, or ballot issues. And the stories that do run focus on polls and the horse race rather than the candidates' backgrounds or positions.

The Alliance for Better Campaigns reports that local TV stations took in $1.6 billion in political advertising from the 2004 elections.[14] Yet Martin Kaplan of the Annenberg School for Communications and the Norman Lear Center this week filed a stunning report that more than 90% of news broadcasts for the month before election day in 2004 contained no stories at all about any local candidate races.[15] Of those election coverage stories that aired, only one-third focused on actual issues, as opposed to campaign strategy and the horserace.[16] Eight times more coverage was devoted to stories about accidental injuries than to coverage of all local races combined.[17]

And this was *after* Senate Commerce Committee Chairman John McCain, Chairman Powell and I all stood together at a press conference and put broadcasters on notice that we would be watching the 2004 coverage, and that we expected broadcasters to do better job than they had in past elections. The broadcasting industry may dispute these findings, yet the industry fails to provide its own comprehensive and systemic studies, despite my request that they do so. Absent industry studies, I will continue to rely on the few good studies that we do have.

Recent events seem to validate claims that broadcasters' news coverage has been increasingly devoid of information to help citizens participate in their democracy, or, worse yet, promoting an ideology or unbalanced political agenda thinly disguised as journalism.[18] Sinclair Broadcasting Group, which refused to air an ABC Nightline tribute to US soldiers killed in Iraq deeming the show "politics disguised as news," then instructed its 62 television stations to preempt regularly scheduled programming to air a politically-charged documentary, "Stolen Honor: Wounds That Never Heal," even going so far as to fire its long-time reporter John Lieberman for criticizing the company's plans.[19] Lieberman subsequently asserted that Sinclair's entire news operation is systematically ideologically driven by its

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[14] Alliance for Better Campaigns, "Local Stations Are Big Winners in Campaign 2004: TV Broadcasters Rake in More Than $1.6 Billion in Political Advertising," available at www.bettercampaigns.org/standard/display.php?StoryID=322.

[15] Lear Center Local News Archive, Local News Coverage of the 2004 Campaigns: An Analysis of Nightly Broadcast News in 11 Markets 3, 8 (filed in FCC Docket No. 04-233).

[16] *Id.* at 11.

[17] *Id.* at 3.

[18] *See, e.g.*, Mark Gillespie, "Media Credibility Reaches Lowest Point in Three Decades," Gallup Organization (Sept. 23, 2004) (Gallup Poll indicating that just 44% of Americans express confidence in the media's ability to report news stories accurately and fairly).

[19] *See, e.g.*, "Public Airwaves, Private Purpose," *Business Week* (Oct. 25, 2004); Michael Learmonth, "B'casters Caught in Sinclair Glare," *Variety* (Oct. 24, 2004); Reed Hundt, "Sinclair Ought to Know Better – and So Should the FCC," *Minnesota Star Tribune* (Oct. 13, 2004) (noting that "in a large, pluralistic information society democracy will not work unless electronic media distribute reasonably accurate information and also competing opinions about political candidates to the entire population").

owners' political perspective. Although Sinclair broadcast a modified program, Paxson, which sells much of its non-prime air time for paid programming, then quietly broadcast the "Stolen Honor" documentary in its entirety ten times the weekend before the election on the PAX broadcasting network as an infomercial.[20] CBS News and anchor Dan Rather were derailed over forged documents related to President Bush's Vietnam-era military service.[21] And just before the election, Pappas Telecasting Companies was faulted by the FCC for blatantly violating our equal time rules by donating $325,000 in airtime to one party's candidates without offering the same amount of free time in comparable time periods to the other party's candidates.[22]

Increasingly, it seems we're in an era where ownership and ideology shape what viewers see and hear over their public airwaves. An exclusive federal license to use the public airwaves ought to carry a higher level of civic responsibility and accountability. Broadcast licensing should serve the civic needs of a democracy by preserving the freedom of an "uninhibited marketplace of ideas"[23] to serve the common good. Instead, if broadcasters use their exclusive federal licenses to promote an ideology or political agenda, they put their own private beliefs ahead of the needs of a democratic society.

A broadcasting license should do more than line the pocket books of the broadcaster. I'm concerned with reports of the rising level of paid programming on the public airwaves. A 2003 study by the Alliance for Better Campaigns found that community public affairs programming accounts for less than 1/2 of 1 percent of local TV programming nationwide – that compares to 14.4 percent for paid programming.[24] Even Paxson, which so strongly advocates multicasting must carry, boasts that paid programming represented 41% of PAX TV's 2003 revenue.[25] This bears heavily on the underlying policy issue of multicasting – should public policy reward those broadcasters who sell the public airwaves with full multicast cable carriage?

Since much of television and radio was deregulated in the early 1980s, market forces alone, without concrete regulatory monitoring and enforcement, have seemingly eroded much of the local service on which the industry was founded. Yet the NAB opposes a mere inquiry by the Commission into the local service that is currently being provided.[26] NAB laments more disclosure and accountability as an impediment to the journalistic discretion of broadcasters – apparently discounting that they hold their licenses as stewards of the public interest. NAB even suggests that a requirement to air a certain amount of local programming would face constitutional problems. Yet it argued exactly the opposite in its

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[20] According to press reports, the conservative news website, NewsMax.com, spent $294,500 to buy infomercial time for the film on the PAX broadcast network, which reaches nearly 90% of U.S. television homes. *See, e.g.*, Walter F. Roche Jr., "Group Challenges Sinclair Licenses," *Los Angeles Times* (Nov. 2, 2004).

[21] *See, e.g.*, Josh Getlin & Scott Collins, "Report Condemns CBS News," *Los Angeles Times* (Jan. 11, 2005). Sumner Redstone, the Chairman of CBS's parent company, Viacom, later enthusiastically endorsed the election of a Republican administration because it "has stood for many things we believe in, deregulation and so on." Johnnie L. Roberts, "Media Mogul Maelstrom," *Newsweek* (Oct. 4, 2004).

[22] *See* In re Equal Opportunities Complaint Filed By Nicole Parra Against Pappas Telecasting Companies, Order (rel. Oct. 29, 2004).

[23] *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

[24] Alliance for Better Campaigns, "All Politics is Local," available at http://www.bettercampaigns.org/reports/display.php?ReportID=12.

[25] Pax TV, Annual Report, available at http://www.sec.gov/Archives/edgar/data/923877/000100515004000854/0001005150-04-000854.txt.

[26] *See* NAB Localism Comments, *supra* note 3, at i ("The National Association of Broadcasters oppose the Notice of Inquiry on localism.").

petition to have the Commission restrict the local programming of satellite radio providers.[27] If NAB claims banning local content is constitutionally permissible, surely requiring local content could also be.

NAB's outright hostility to the localism inquiry raised real questions for me about how broadcasters will choose to fill the extra digital programming capacity. NAB admits that many stations have dropped local newscasts, without discussing the effect this is having on the station's stewardship in those communities. NAB sees little connection between broadcast localism and national playlists and voice-tracking technology,[28] oblivious to the loss of localism from these tactics. NAB relies upon a study showing that syndicated programming costs less than news production.[29]

So without strong public interest obligations, how can the Commission, let alone the viewing public, be assured that the extra digital channels will add to localism and diversity? Without concrete public interest obligations, there are no protections against non-local or paid programming content filling up the entire extra capacity. Without some modicum of balance, the government could be multiplying an ideological agenda five-fold. Without assurances of localism, the extra broadcast program streams could merely be the same type of 24-hour national feed that are found on cable systems. Worse, the government could theoretically be mandating carriage of 24-hour a day infomercials. I'm not suggesting this would happen, but the mere possibility gives me enormous pause.

I remain steadfastly committed to the strong governmental interest in ensuring "public access to a multiplicity of information sources."[30] While I respect the need for diverse sources of information, particularly for news and civic information, magnifying one owner's views over more channels does not translate into more diversity of information sources. It just gives a bigger megaphone to voices that are already booming. Since the vast majority of television signals on cable are carried under retransmission consent arrangements, granting multicast must carry could embolden big media companies to leverage their clout into even bigger platforms for disseminating their views.

Broadcasters do not appear eager to turn over extra programming capacity to underserved segments of the community, or take other steps to further the strong governmental interest in expanding the diversity of viewpoints and voices available to the American public over its airwaves. President Clinton's Advisory Committee on the Public Interest of Digital Television Broadcasters recommended that multicasting broadcasters, in exchange for the benefits the capability may give them, make multicast channels available to local voices and unaffiliated programmers.[31] Public interest protections like these would greatly strengthen the argument that granting multicast must carry would contribute to the widespread dissemination of information from a multiplicity of sources. It would buttress the case for multicasting in court against a constitutional challenge. Without such steps, I fear a multicasting carriage mandate could have an overall deleterious effect on diversity by crowding out other publicly-oriented programming like C-SPAN 3.

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[27] *See, e.g.*, In re Request for Comment on Petition Filed by the National Association of Broadcasters Regarding Programming Carried by Satellite Digital Audio Radio Services, MB Docket No. 04-160, Reply Comments on the National Association of Broadcasters at 12-13 (filed Apr. 14, 2004).

[28] *See* NAB Localism Comments, *supra* note 3, at iv, 53-61.

[29] *Id.* at 33.

[30] *Turner Broad. System. v. FCC*, 520 U.S. 180, 190 (1997) (quoting *Turner Broad. System v. FCC*, 512 U.S. 622, 633) (1994)).

[31] Advisory Committee Report, *supra* note 11, at 55 (suggesting that digital television broadcasters who multicast, and "in doing so reap enhanced economic benefits," might "include a commitment to provide robust programming and access for local voices , or lease one such channel at below market rates to an unaffiliated programmer who is local and has no financial or other interest in a broadcast station").

Quite simply, without public interest protections, any claim that multicast must carry is needed for the preservation of free over-the-air broadcasting rings hollow. It is simply unacceptable to maintain that broadcasting is a free market whenever proposals are made about accountability, but then, without blinking, turn around and demand a government mandate for free cable carriage of multiple signals, not to mention other protections for the industry. If broadcasters want to be treated as an integral public square on our modern-day digital platforms, then they must realize the public has a right to be squarely involved in that endeavor. To grant multicasting carriage without any protections for the public would test the willingness of the broadcasting industry to serve public ends as never before. It's a risk the recent record does not justify taking.

That said, I remain concerned that broadcasters' quality local multicast content must receive carriage from cable companies on its own merits. I have heard troubling allegations of cable companies refusing to carry programming – not because it fails to provide quality local content but for a business or economic decision that favors other channels which bring advertising revenue or other advantages to the operators. I'm also concerned that independent or publicly-oriented channels receive cable carriage on a merit basis without the cable industry extracting an ownership percentage in return. If cable operators fail to carry local content that broadcasters seek to air on multicast streams, they should know that I will do all I can to help bring about that carriage. I will openly condemn any cable operators that do not agree to carry such programming, as long as it is offered by broadcasters without any strings attached.

To not risk losing relevance in the digital future, broadcasters can continue to choose to drive innovation and champion the potential of digital broadcasting. They can produce the kind of strong local programming that would serve their communities and would fuel the transition. They can run public service announcements promoting the benefits of the transition for viewers. The recent Consumer Electronics Show displayed countless devices seeking to enrich digital video content, making the potential of digital television all the more evident. By driving the transition, broadcasters stand only to transform the television viewing experience in dazzling and potentially lucrative new ways.

Indeed, while I understand the broadcast industry has incurred great costs, it has also been granted generous benefits in the DTV transition. Broadcasters have already been given a free second allotment of spectrum, free guaranteed cable carriage for a DTV signal (upon surrendering their analog spectrum), guaranteed access to the basic service tier, retransmission consent rights, and the right to use their spectrum for revenue-producing ancillary and supplemental services – all without agreeing to abide by any specific and meaningful public interest commitments.

This country has waited long enough with the hope that this Commission would act upon the longstanding public interest matters in a way that enhances the digital transition for consumers. The public interest inquiry has lingered for more than five years, far longer than the reconsideration petitions in this proceeding. Perhaps Paxson's direct challenge in the courts forced the timing of today's item. One wonders whether the public interest community would have had similar success had they pointed out their remarkable patience to the D.C. Circuit.

That is not to say that I would have chosen this process under any circumstance. And I remain hopeful that Congress will have more ability to bring about protections for the public. If each additional program stream were guaranteed to carry other voices, or a significant percentage of locally-produced content subject to meaningful public interest protections, the governmental interest in fostering localism and free-over-the-air television for viewers would carry far more weight. Of course, recognizing the tremendous value of localism, one would expect – and I will demand – that the cable industry carry all such programming voluntarily without hesitation or discrimination. The Act, after all, already identifies

as a purpose that "cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[32]

So today I stand up today for the public. I take today's action entirely for the viewers who entrust the Commission to oversee the stewardship of their airwaves in their best interest.

[32] 47 U.S.C. § 601(4).